IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RANDA MULANAX,	§	
for herself and all	§	
others similarly situated,	§	
	§	
Plaintiff,	§	
	§	
V.	§	**CAUSE NO. 1:15-cv-1189-RP**
	§	
STEADFAST MANAGEMENT	§	
COMPANY, INC.	§	
AND SIR MONTECITO, LLC	§	
	§	
Defendants.	§	

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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COMPANY, INC.	§	
AND SIR MONTECITO, LLC	§	
	§	
Defendants.	§	

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT

Plaintiff Randa Mulanax ("Plaintiff") for herself and all others similarly situated (Plaintiff and the putative Class members are collectively referred to as the "Class") file this Unopposed Motion for Preliminary Approval of Proposed Class Settlement as follows. Solely for purposes of settlement, Defendants Steadfast Management Company, Inc. and SIR Montecito, LLC ("Defendants") do not oppose this motion.

I. INTRODUCTION

1. After more than a year of highly-contested litigation, discovery, numerous discussions between counsel for the parties, and a two-day mediation with experienced Dallas mediator Christopher Nolland, the Parties have reached a settlement agreement, which, if approved by the Court, will end this litigation brought pursuant to Chapter 13 of the of the Texas Water Code and Chapter 291 of the Texas Administrative Code. The settlement will provide each

participating Class member a direct disbursement from a settlement fund of $169,256, with average payments to each Household of $270. This is significant monetary consideration being provided in exchange for the release given by the Class Members.

2. Preliminary approval should be granted so long as the proposed settlement is within the range of possible approval, and Plaintiff here has made the necessary showing. The proposed Settlement was reached through arms-length bargaining with the assistance and considerable involvement of experienced counsel and a respected mediator. The Settlement will result in financial benefit to all class members, and is fair and reasonable given the defenses raised to the recovery of damages and the scope of the potential damages.

3. Plaintiff now moves for preliminary approval of the Settlement (attached as **Exhibit 1** hereto) pursuant to Federal Rule of Civil Procedure 23(e), and requests that the Court order that notice be sent to the Class. Plaintiff additionally requests that the Court set a date for the final approval hearing, and enter an order substantially in the form submitted by the Parties.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Procedural history

4. On December 17, 2015, Plaintiff filed a complaint in this Court on behalf of herself and a putative class alleging that Defendants committed various violations of Chapter 13 of the Texas Water Code and Chapter 291 of the Texas Administrative Code. Defendants moved to dismiss the complaint. (Monts Decl., **Exhibit 2**).

5. On March 28, 2016, Plaintiff filed a First Amended Complaint ("FAC") against Defendants. *Id.* In the FAC, Plaintiff alleged, among other things, that she was improperly assessed a nine percent monthly service charge under Texas Water Code § 13.503(c) in connection with her monthly water and sewer charges (hereafter, "9% charge"). *Id.* The 9% charge was listed

on the monthly statement to tenants prepared by Defendants' utility billing service provider, Conservice, LLC, as a "Water/Sewer Admin Fee." *Id.*

6. Defendants moved to dismiss the FAC, and Plaintiff responded. *Id.* The motion to dismiss was denied on August 3, 2016, and Plaintiff propounded discovery. *Id.*

7. The Parties ultimately agreed to mediate the case. *Id.* As part of the mediation process, Defendants produced significant case-specific information for settlement purposes to allow Plaintiff to assess the potential damages in the case. *Id.*

8. The Parties then participated in a two-day mediation before Christopher Nolland, an accredited neutral in Dallas, Texas, on November 15 and 16, 2016, where they reached an agreement on the material terms, subject to Court approval under Rule 23(e) of the Federal Rules of Civil Procedure. *Id.* Subsequent negotiation and drafting was necessary to fully document the Settlement, and the parties executed the Settlement on January 6, 2017 to settle this action.

B. Overview of Chapter 13, Subchapter M of the Texas Water Code

9. The Texas Legislature enacted and later amended Chapter 13, Subchapter M of the Texas Water Code (TEX. WATER CODE § 13.501, *et seq.*; "the statute"), to specify how "apartment house owners" are allowed to pass-through their water and sewer utility costs to tenants, to prevent landlords from using water utility billing as a separate profit center, and to encourage conservation through submetering of multifamily properties. Under Section 13.501(1), "apartment house" means one or more buildings containing five or more dwelling units which are occupied primarily for nontransient use, including a residential condominium, whether renter or owner occupied, and having rental paid, if a dwelling unit is rented, at intervals of one month or longer, and under Section 13.501(5), "'owner' means the legal titleholder of an apartment house … and any firm, or corporation that purports to be the landlord of tenants ….".

10. The statute is divided into two sets of rules, one for submetered properties and another for non-submetered properties. Plaintiff asserts that the 9% "service fee" is only permitted when a property is submetered; Montecito was not submetered for all water use, just hot water.

11. The Texas Legislature further added a separate enforcement provision unique to subchapter M of the Texas Water Code and its submetering and non-submetering rules. TEX. WATER CODE § 13.505 provides a private right of action for an apartment house tenant under which she may recover three times the amount of any overcharge, a civil penalty equal to one month's rent, reasonable attorney's fees, and court costs from an owner who violates the statute.

12. The agreed upon settlement relief effectuates the remedy provisions of the statute. The Settlement, if approved, provides a recovery of 3x the alleged overcharged amount, and provides for a recovery of additional amounts to the Class Members. The Settlement also contemplates that Defendants will pay attorneys' fees to Class Counsel, and reimburse the costs of prosecuting the case incurred by Class Counsel.

13. The Settlement also provides for Defendants to pay an incentive award to the Class Representative, and to pay for the costs of administration of the Settlement terms.

III. SUMMARY OF SETTLEMENT TERMS

14. The proposed Class Action Settlement Agreement signed by the Parties (the "Settlement") is attached to this motion as **Exhibit 1**, the Declaration of Class Counsel Britton D. Monts ("Monts Decl.") is attached as **Exhibit 2**, and the Declaration of Plaintiff Randa Mulanax ("Mulanax Decl.") is attached as **Exhibit 3**, all of which are fully incorporated by reference.

A. The Settlement Class

15. The proposed Class for settlement purposes is defined as:

All current and former residential tenants who are or were named parties to a lease at the Montecito apartment community, located at 3111 Parker Lane, Austin, Texas 78741, from September 1, 2013, to September 30, 2016, and whose Household was billed a 9% charge in connection with the monthly water and sewer billing.

The following are excluded from the Settlement Class:

(i) the judge(s) assigned to this case and his or her staff;
(ii) governmental entities;
(iii) Defendants and their affiliates;
(iv) persons adjudged to be bankrupt; and
(v) persons who have previously released Defendants of the claims raised by the Action.

(Ex. A, Settlement, at 5, ¶ 4). Defendants have identified 625 Households ("Household" is defined at p. 2 of the Settlement) at Montecito that were billed a total amount of the 9% charges equaling $29,752. (Ex. A, Settlement, at 8, ¶ 12).

B. Monetary Consideration to the Class

16. Pursuant to the Settlement, each Participating Class Member, without the need to submit a claim form, will be mailed a check in an amount calculated as follows:

(a) a proportionate share of the amount of 9% charges billed to each Household, multiplied by three as provided by TEX. WATER CODE § 13.505 (total of $89,256; on average, approximately $142 per Household); **plus**,

(b) a share of the additional amount of $80,000 to be divided equally among all the Participating Class Members by Household (approximately $128).

(Settlement, at 8-9, ¶ 12).

17. For Participating Class Members in Households with more than one current or former tenant who is a party to the lease, the settlement payment, as calculated above in subsection will be divided equally based on the number of current or former tenants who are a party to the lease in the Household.

18. As a protection to the Class, to the extent that Defendants later ascertain that an amount more than $29,752 in 9% charges were billed to Class Members, then the $89,256 amount stated above shall be adjusted upward to an amount equal to three times the subsequently ascertained amount of 9% charges billed to Class Members. Also, to the extent that Defendants later ascertain the number of Households is greater than 625, then each additional Household identified shall receive $128 in addition to the amount calculated in subsection (a) above. As a cumulative amount, Class Members will be returned well in excess of 3x the alleged overcharges.

19. No claim forms are required for Class members to receive their settlement checks. There is no need for injunctive relief because Defendants ceased the complained-of billing practices. The proposed settlement does not involve coupons or a *cy pres* component. After the notice is mailed to the Class using current and last known addresses maintained by Defendants (a Class Settlement Website also will be created and referenced in the Notice Form to provide Class members with additional information), those members who remain in the Class will receive checks in the mail upon final approval of the settlement and entry of a final, non-appealable order.

C. Class Representative Enhancement

20. The Defendants have agreed to pay the Class Representative an enhancement award of $7,500, subject to Court approval, for the extensive time and effort placed into prosecuting this case, as well as the personal risk associated with pursuing the claims. (Settlement, at 9-10, ¶ 13).

D. Attorneys' Fees and Litigation Expenses

21. Class Counsel have incurred significant time and expense prosecuting this matter over the last fourteen months. Presently, Class Counsel have a significant lodestar (hours X billable rate) that has accrued. Defendants have agreed to pay Class Counsel up to $198,500 for

attorneys' fees and reasonable litigation expenses and costs incurred prosecuting this action (Settlement, at 10, ¶ 14), subject to Court approval.

E. Costs of Administration

22. Finally, in addition to all relief obtained, Defendants have agreed to pay a Third-Party Administrator (the "TPA") for distributing notice and for administering the payments made pursuant to the Settlement. (Settlement, at 4).

F. The Release of Claims

23. In exchange for the monetary relief being provided by Defendants, the Class Members will provide a tailored release. The claims to be released are:

> any and all claims, obligations, causes of action, actions, demands, rights, and liabilities of every kind, nature and description, including penalties, liquidated damages, punitive damages, interest, attorneys' fees, litigation costs, restitution, and equitable relief under any state statute, federal statute or common law theory, whether known or unknown, whether anticipated or unanticipated, arising prior to the Final Approval Date, which were pled in the Action or could have been pled in the Action, including without limitation, all claims under the Texas Water Code, the Texas Administrative Code, and/or any lease between the Parties and/or between Defendants and Participating Class Members, that relate to water and sewer billing.

(Settlement at 10-11, ¶ 15). The release period ends as of the date the Court grants Final Approval of the Settlement. (*Id.*).

G. The Class Notice

24. Each Class Member will be given direct-mailed postcard notice of the terms of the proposed Settlement, as discussed more fully at § IV(C), *infra*. A complete version of the Postcard Notice is attached to the Settlement as **Exhibit C**. The Postcard Notice will direct Class Members to the Settlement Website, where the Long Form Notice will be available. A complete version of the Long Form Notice is attached to the Settlement as **Exhibit B**.

IV. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

25. The law favors settlement. "Particularly in class action suits, there is an overriding public interest in favor of settlement." *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977), *citing United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975). Before the Court can approve a class action settlement, the Court must find that the proposed settlement is "fair, adequate, and reasonable" under Rule 23(e). *In re: Corrugated Container Antitrust Litigation*, 643 F.2d 195, 206 (5th Cir. 1981), *citing Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977).

26. Under Rule 23, there are defined procedures and specific criteria for settlement approval in class action settlements. The Rule 23(e) settlement approval procedure describes three distinct steps:

(i) Preliminary approval of the proposed settlement upon submission to the Court of a written motion for preliminary approval;

(ii) Dissemination of mailed and/or published notice of settlement to all affected Class members; and

(iii) A formal fairness hearing, or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy and reasonableness of the settlement is presented.

The first step in approving a proposed class settlement is to decide if it should be approved preliminarily so adequate notice can be sent to the class and a final hearing scheduled to determine if the settlement is fair, reasonable, and adequate and if final approval is warranted. *See, e.g., Wal-Mart Stores v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005). The Federal Manual for Complex Litigation devotes substantial attention to the preliminary approval of class action settlements. *See* Manual for Complex Litigation (Fourth) §§ 21.132, 21.632 (2004). As the Manual for Complex Litigation indicates, the judge reviews the proposed terms of the settlement and "makes a preliminary fairness evaluation," and makes "a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." *Id.* § 21.632.

27. This procedure safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of class interests. 4 Newberg on Class Actions §§ 11.22 *et seq*. The additional rulings sought in this motion – approving the form, content and distribution of Class Notice and scheduling a formal fairness hearing – facilitate the settlement approval process and are also typically made at the preliminary approval stage. 4 Newberg §§ 11.24 *et seq.*

28. The "preliminary fairness evaluation" of a proposed settlement "is not a fairness hearing." *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980). Rather, the limited purpose of this initial inquiry is to determine, at a threshold level, only whether the proposed settlement is within the range of possible approval (the "range of reasonableness") and, as a result, "whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Id.* "The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." Manual for Complex Litigation (Fourth) § 21.632 (2004).

A. The Prerequisites for Class Certification Have Been Met

29. A rigorous analysis of the pleadings, documents, and other materials before the Court establishes that all the prerequisites for class certification under Rule 23 have been met. In addition to the 23(a) requirements, parties seeking class certification must show that the action is maintainable under Rule 23(b), and specifically in the instant action, under Rule 23(b)(3). Rule 23(b)(3) requires the court to determine that the questions of law or fact common to the members

of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Ackal v. Centennial Beauregard Cellular L.L.C.*, 700 F.3d 212, 216 (5^{th} Cir. 2012). The matters pertinent to these issues include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. Because a settlement class action obviates a trial, a trial court faced with a request to certify a settlement class action "need not inquire whether the case, if tried, would present intractable management problems" under Rule 23(b)(3)(D). *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

1. Class Definition

30. The plain language of the definition of the class establishes that the class members are presently ascertainable by reference to objective criteria (i.e., the Class has not been defined by criteria that are subjective or that require an analysis of the merits of the case). The language of the class definition clearly identifies the persons and entities affected by the litigation. The definition unambiguously determines who is entitled to individual notice, and who is entitled to opt out of the Class should they choose to do so. The Class members are also ascertainable, and the Defendants have already identified the Households, and the members of those Households, who comprise the Class.

2. Numerosity

31. The class representative must show that "the class is so numerous that joinder of all members is impracticable" under Rule 23(a)(1). In this case there are at least 625 Households (with each Household being comprised of one or more Class members). The numerosity prerequisite has been satisfied. (Settlement, at 8, ¶ 12).

3. Commonality

32. The class representative must show "there are questions of law or fact common to the class" under Rule 23(a)(2). The threshold of commonality is not high. Yet it does require at least one issue of law or fact "that inheres in the complaints of all class members." *Id.* A common issue must also be applicable to the class as a whole and be subject to generalized proof. The common issue may be one of law or fact; there need not be common issues of law and fact. A single common question could provide grounds for class action."

33. The questions of fact and law affecting the Class as a whole in this case, include, but are not limited to, (i) whether Defendants were entitled to charge the 9% fee; (ii) whether each member of the Class is entitled to a refund of the 9% fee; (iii) whether Defendants made a good faith, unintentional mistake in charging the 9% fee such that the penalty should not be assessed; and (iv) whether each member of the Class is entitled to recover a penalty. There are questions of law or fact common to the class. The commonality prerequisite has been satisfied.

4. Typicality

34. The class representative must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" under Rule 23(a). This means that the named plaintiff must possess the same interest and suffer the same injury as the rest of the class. Plaintiff's claims are typical of the claims of the members of the Class. All the claims

arise out of the same type of fees charged and all the claims are based on the same legal theory (a Texas statute) and subject to the same defenses. Here, Plaintiff was charged, and paid, the 9% "administrative fee." *See* Dkt. 10-2 (Plaintiff's bills reflecting charges of $1.11 in October 2015, $10.13 in November 2015; and $10.05 in December 2015). The typicality prerequisite is satisfied.

5. Adequacy

35. The class representative must show that "the representative parties will fairly and adequately protect the interests of the class" under Rule 23(a)(4). Courts consider whether any antagonism exists between the class representatives and the class members, and whether the representative parties will vigorously prosecute the class claims. Courts also consider the zeal and competence of class counsel and the willingness and ability of the representative to take an active role in the litigation and to protect the interests of absent members.

36. Prior to negotiating the settlement, the class claims were vigorously prosecuted by Plaintiff and Class Counsel. Class Counsel has zealously represented the members of the Class and are qualified to serve as counsel for the members of the Class. (Monts Decl.; Mulanax Decl.).

6. Predominance

37. The class representative must show "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" under Rule 23(b)(3). Because predominance is one of the most stringent prerequisites to class action certification, it is considered first and must be rigorously applied. Courts determine if common issues predominate by identifying the substantive issues of the case that will control the outcome of the litigation, assessing which issues will predominate, and determining if the predominating issues are, in fact, those common to the class. The test for predominance is not whether common

issues outnumber uncommon issues but whether common or individual issues will be the object of most of the efforts of the litigants and the court.

38. Before settlement, any individual issues or defenses that would be the object of any efforts on the part of the litigants were matters that could be determined based on objectively verifiable information maintained by Defendants in their electronic files and other records. Indeed, under the Texas Water Code the Defendants are required to maintain the information regarding the charges assessed. Under 16 Tex. Admin. Code § 24.122(e) and (f) (formerly 30 Tex. Admin. Code Section 291.122(e) and (f)), Defendants "shall make … available for inspection by the tenant … (10) any … information necessary for a tenant to calculate and verify a water and wastewater bill…" and "[e]ach of the records required under subsection (e) … shall be maintained for the current year and the previous calendar year, except that all submeter test results shall be maintained until the submeter is permanently removed from service." Common issues predominate, and a judgment after certification and trial would have decisively settled the entire controversy as to all members of the Class. The predominance prerequisite has been satisfied.

7. Superiority

39. The class representative must show that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" under Rule 23(b)(3). A class action here is superior to other available methods for the fair and efficient adjudication of this controversy. Given the size of the class, individual adjudication of the claims would require hundreds of lawsuits. Moreover, intervention and joinder would require the intervention or joinder of hundreds of parties. Individual adjudication, intervention, and joinder, therefore, are not reasonable options. Class treatment is superior to all other methods of adjudicating the claims of the putative class. The superiority prerequisite is satisfied.

8. Individual Control

40. The court must consider the interest of members of the class in individually controlling the prosecution of separate actions under Rule 23(b)(3)(A). The interests of members of the Class in individually controlling the prosecution or defense of separate actions do not outweigh the benefits of class treatment. Individual members of the Class possess claims for economic damages that do not exceed $2,000.00. Thus, no individual class member possesses an overriding interest in the right to retain counsel and litigate to conclusion an individual claim. Individual adjudication of these claims remains wholly impractical. The class members would be compelled to spend substantially more money on attorney's fees and case costs to prosecute their individual claim than the amount of each individual claim. The interest of members of the class in individually controlling the prosecution or defense of separate actions does not outweigh the benefits of class treatment.

9. Related Litigation and Desirability of Forum

41. The court must consider the extent and nature of related litigation and the desirability of concentrating the litigation of the claims in a particular forum. FED. R. CIV. P. 23(b)(3)(B). There are no other known cases pending by or against members of the Class raising the claims asserted in this action. The Western District of Texas, Austin Division, is a desirable forum in that the case is purely a claim under Texas law, and this Court, exercising limited diversity jurisdiction under CAFA, is capable of adjudicating the claims. In that there is no related litigation, and the forum is desirable, class treatment is warranted.

10. Manageability

42. Because a settlement class action obviates a trial, a trial court faced with a request to certify a settlement class action "need not inquire whether the case, if tried, would present

intractable management problems" under Rule 23(b)(3)(D). *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

B. The Settlement is Fair, Adequate and Reasonable

43. The Fifth Circuit has held that a trial court should consider six factors in assessing the fairness, reasonableness and adequacy of a proposed class settlement:

(1) whether the settlement was a product of fraud or collusion;

(2) the complexity, expense and likely duration of the litigation;

(3) the state of the proceedings and the amount of discovery completed;

(4) the factual or legal obstacles to prevailing on the merits;

(5) the possible range of recovery and the certainty of damages; and

(6) the respective opinions of the participants, including class counsel, class representatives, and absent class members.

In re Katrina Canal Breaches Litigation, 628 F.3d 185, 194-195 (5th Cir. 2010); *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir.1983). Consideration of each of these factors – which are commonly referred to as the *Reed* factors – demonstrates that the Stipulation of Settlement is fair, adequate and reasonable.

1. The Stipulation of Settlement Should be Approved as it is Not the Product of Fraud or Collusion

44. Courts and commentators have endorsed the notion that a "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." Manual for Complex Litigation, Third § 30.42 (1995); *accord Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009); *In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litigation*, 2012 WL 948365, *15 (S.D. Tex.

2012); *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 650 (N.D. Tex. 2010)("When considering the *Reed* factors, the court should keep in mind the strong presumption in favor of finding a settlement fair." (internal quotation marks and alteration omitted)).

45. Here, the proposed Settlement is the product of arm's length negotiations by capable, experienced attorneys. (Monts Decl.). The proposed settlement was structured after a two-day mediation before Christopher Nolland on November 15 and 16, 2016, where they reached an agreement, subject to Court approval under Rule 23(e) of the Federal Rules of Civil Procedure. (Monts Decl., Ex. 'B'). It is not the product of fraud or collusion. (*Id.*). The Parties have vigorously advocated opposing points of view on a multitude of issues since this case was filed at the end of 2015, including a hotly contested motion to dismiss resulting in a lengthy, 27-page opinion by this Court (*See* Dkt. 21) (Monts Decl.). The parties also utilized the services of a skilled mediator to assist in the process. (Monts Decl). The Settlement follows – and is undeniably the result of – vigorous advocacy of opposing viewpoints. That advocacy ultimately led to the necessity of all parties to make reasonable concessions to resolve the remaining issues in the case.

2. Further Pursuit of This Case Would be Complex, Expensive, and Time-Consuming

46. While the ultimate expense and duration of any litigation cannot be predicted with certainty, the history of this litigation gives every indication that, if the parties had not reached the Settlement, the remaining legal and factual issues would likely be hard fought and would likely result in appeals both from the contested class certification ruling and the liability and damages findings. (Monts Decl.).

47. For example, Defendants already have filed multiple motions to dismiss, and there have been numerous briefs submitted by the parties resulting in a lengthy ruling by this Court.

Defendants asserted the defenses set forth in Defendants' live pleading (Dkt. No. 25) and in its Motion to Dismiss (Dkt. No. 12), which motion was denied by the Court (Dkt. No. 21). While Plaintiffs rigorously opposed Defendants' arguments, and prevailed on Defendants' Motion to Dismiss, Defendants' arguments posed some risk to the Class. (Monts Decl.).

48. Defendants have already stated their intention to file dispositive rulings in the future. Plaintiff disputes the Defendants' right to such relief, and insist that damages are recoverable under the Water Code. If this case were not settled, the losing party on this essentially binary issue –in an area that is not fully developed in the case law– would likely appeal the result. Such an appeal would be expensive and time-consuming to resolve, and would further delay recovery for the members of the class. In the Fifth Circuit, these are exactly the types of concerns that should be taken into account when analyzing the propriety of a settlement. *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004) (fact that settlement would avoid risks and burdens of potentially protracted litigation weighed in favor of approving settlement). The proposed settlement saves considerable resources of both the Court and the Parties that would otherwise be expended litigating these open issues. This factor supports approving the Settlement.

3. The Stipulation of Settlement Should be Approved Because Class Counsel has Adequate Discovery and Other Information to Realistically Value the Claims

49. This settlement was negotiated after discovery was propounded, and after Defendants produced significant material relating the scope of damages for the Class. The Parties collectively compiled a comprehensive spreadsheet detailing the cost differential between amounts charged and what should have been collected, as well as other damage models. (Monts Decl.). Based on this process, Class Counsel reasonably believe that the Settlement returns almost 540% of the alleged overcharged amount. (*Id.*).

50. Accordingly, the state of the proceedings supports the conclusion that the proposed Settlement was negotiated based on a realistic and informed assessment of the merits of the claims. This case has been extensively litigated, and Class Counsel is fully informed regarding the merits of the unresolved damages claims and able to evaluate a fair settlement. As the Fifth Circuit has regularly affirmed the approval of a settlement agreement even when "very little formal discovery has been conducted," *Cotton v. Hinton*, 559 F.2d 1326, 1332 (5th Cir. 1977), here Class Counsel is certainly in possession of sufficient information to realistically value the claims in this case, and has done so.

4. The Stipulation of Settlement Should be Approved Because Ultimate Success on the Merits is Uncertain for the Claims for Additional Monetary Relief

51. When assessing the adequacy of a settlement, a court is to balance the benefits of a certain and immediate recovery against the inherent risks of litigation. *Newby v. Enron Corp.*, 394 F.3d 296, 302 (5th Cir. 2004); *see also In re General Motors Corp*., 55 F.3d 768, 806 (3d Cir. 1995)("[T]he present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.") (citations and internal quotation marks omitted). Here, the recovery under the Settlement is highly beneficial given the uncertainties posed by continuing to litigate the damages phase of the case. As previously stated, Defendants have vigorously opposed every aspect of Plaintiff's claims. Thus, if litigation continues, it is certain that Defendants will continue to vigorously contest every claim, and it is possible that Defendants could prevail or whittle away at the amounts that fall within the monetary claims. The Settlement affords the Class Members prompt and substantial relief, while avoiding significant legal and factual obstacles that otherwise prevent the Class from obtaining recovery for their monetary claims.

52. The Settlement provides for payment to the Class now, rather than a speculative payment which may not be made until years from now, if at all. Defendants could prevail outright on their anticipated motions for partial summary judgment with respect to the monetary claims, or could otherwise delay payment. A settlement was the preferable means to resolution.

53. Defendants could also appeal an adverse class certification finding. An appeal, of course, might last another year or two. If the appellate court were to overturn the Court's class certification ruling, the case might be remanded to the district court for further proceedings, which, again, could take additional time. It was the Class Representatives' desire to conclude the litigation to immediately move compensation into the hands of the Class. The potential delay and the risks inherent in continued litigation led the Plaintiffs and Class Counsel to conclude that continuing to fight the lawsuit was not the prudent course. (Monts Decl.).

5. The Stipulation of Settlement Should be Preliminarily Approved Because the Settlement Agreement is Fair in Light of the Possible Range of Recovery and Certainty of Damages

54. Defendants have agreed to pay at least $169,256 in monetary benefits to the Class on a claims-paid basis. (Monts Decl.; Settlement at 8-9, ¶ 12). This represents a recovery of approximately 540% of the 9% overcharges that Class Counsel could identify. (Monts Decl.). The benefits provided by the Stipulation of Settlement provide certainty of recovery that Class Counsel could not, in good faith, recommend that the Class reject in favor of a trial.

55. A settlement's adequacy must be judged as "'a yielding to absolutes and an abandoning of highest hopes . . . .' Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation . . ." *Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982).

56. While the Plaintiffs have, to date, prevailed on the motion to dismiss, the Court's prior rulings would inevitably be revisited at the dispositive motion stage and challenged at trial. A risk exists that the Class could recover nothing for their monetary claims, or an amount less than that negotiated in the Settlement. Therefore, considering the potential recovery, the probability of lengthy litigation in the absence of settlement, the risk that the Class would not recover any of its monetary claims, the terms of the Settlement are well within the range of reasonableness.

6. The Stipulation of Settlement Should be Preliminarily Approved Because Class Counsel and Plaintiff Support the Settlement

57. The Settlement has the support of Class Counsel and Plaintiff. *See* Monts Decl. and Mulanax Decl. "The endorsement of class counsel is entitled to deference, especially in light of class counsel's significant experience in complex civil litigation and their lengthy opportunity to evaluate the merits of the claims." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 292 (W.D. Tex. 2007); *see also Stott v. Capital Financial Services, Inc.*, 277 F.R.D. 316, 346 (N.D. Tex. 2011) ("As class counsel tends to be the most familiar with the intricacies of a class action lawsuit and settlement, 'the trial court is entitled to rely upon the judgment of experienced counsel for the parties.'" (*quoting Cotton*, 559 F.2d at 1330)).

58. Moreover, it is anticipated that the Settlement will receive broad support from the Class. Even if they were able to overcome the obstacles of finding legal counsel to pursue their claims, very few Class Members are likely to be inclined to pursue individual claims given the passage of time and the limited amounts at issue. Thus, Class Members would be unlikely to oppose relinquishing the right to an individual claim that they never intended to bring. Consequently, support of Class Counsel, Plaintiff and Class weighs in favor of approving the Settlement.

7. The Settlement has No Obvious Deficiencies

59. The Settlement also "has no obvious deficiencies [and] does not improperly grant preferential treatment to class representatives or segments of the class[.]" *In re Combustion, Inc.*, 968 F. Supp. 1116, 1124 (W.D. La. 1997).[1] The monetary recovery for the Class constitutes a significant and real benefit for Class without the risks and uncertainties that would accompany continued and protracted litigation and appeals. Nothing in the course of the settlement negotiations or the terms of the settlement itself give rise to any concern about its fairness.

60. The Class Representative adequately represents the Class. The Class Representative's participation in the settlement process ensured that all Class Members were treated fairly and equitably. Based on the relative strength of the claims for damages, the Class is recovering approximately 540% of each Class Member's estimated 9% overcharges. The amount negotiated on behalf of the Class reflects Class Counsel's and Class Representative's assessment of risks. In sum, the recovery for the Class, the arm's length nature of the negotiations and the

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[1] The Settlement provides for the Class Representative to receive an incentive payment to recognize time and efforts on behalf of the Class that led to the creation of the benefits shared by the entire class. Such payment does not create a "preferential treatment" impairing preliminary approval. In fact, courts routinely approve incentive awards. *See, e.g., McClain v. Lufkin Industries Inc.*, 2010 WL 455351, *24 (E.D. Tex. 2010) (court awarded "a total of $134,000, approximately 2.4% of that Fund, to twenty-two" class representatives, named plaintiffs and class members who had assisted class counsel, noting that "[t]he total amount of the Participation Awards and the individual amounts awarded here are reasonable and consistent with awards in other cases in the Fifth Circuit); *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 504 (N.D. Miss. 1996) (approving incentive awards of $10,000 to each of the four named plaintiffs); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F.Supp.2d 942, 973 (E.D.Tex.2000)(approving incentive awards of $25,000 to each of two named plaintiffs).; *In re Linerboard Antitrust Litigation*, 2004 WL 1221350 (E.D. Pa. June 02, 2004)($25,000.00 incentive award approved for each of the five class representatives).

In order to determine whether an award is reasonable, the Court must individually evaluate the award, considering relevant factors, including Plaintiff's actions for the interests of the class, the degree of benefit to the class by those actions, and the amount of time and energy the Plaintiff has expended for the litigation. Class Counsel will submit proof of such involvement in connection with briefing for the final fairness hearing, but, in summary, the Class Representative participated in the preparation and prosecution of this class action litigation; assisted Class Counsel in responding to discovery; and have revealed confidential, personal information for purposes of the prosecution of the case. The agreement for an incentive award payment to the Class Representative is disclosed to absent class members in the Class Notice.

participation of sophisticated counsel throughout the litigation supports a finding that the proposed Settlement is sufficiently fair, reasonable and adequate to justify notice to the Class and a hearing on final approval. Plaintiff respectfully request preliminary approval of the Settlement.

8. The Scope of Release is Tailored to the Claims Raised in this Case

61. The release to be exchanged for the consideration was specifically negotiated by Class Counsel to be tailored to the claims raised by the events at issue in this litigation. Accordingly, Class Members are not releasing all claims they may have against the Defendants. Rather, they will only be releasing claims that arose out of Defendants' conduct challenged in this lawsuit and enumerated in the Settlement. (Settlement, at 10-11, ¶ 15).

9. The Attorneys' Fees Requested are Reasonable

62. TEX. WATER CODE § 13.505 provides that "the tenant may recover "reasonable attorney's fees, and court costs [from Defendant.]"

63. Prior to the final fairness hearing, Class Counsel will submit a formal Motion for Award of Fees and Brief in Support, seeking approval of an award not to exceed $198,500 as compensation for attorneys' fees and reimbursement of costs and expenses. Class Counsel will necessarily spend additional time to shepherd this case through the final fairness hearing, and for travel associated with the two remaining hearings. (Monts Decl.).

64. The requests for attorneys' fees and expenses are contemplated by Settlement and are not opposed by Defendants. The proposed Class Notice advises the Settlement Class Members of Class Counsel's intention to seek approval of these fees and expenses.

65. As Newberg notes, "In cases not involving a common fund, or in cases in which the plaintiffs would usually seek a fee award authorized by statute and payable by the defendant, the motion for reasonable fees to be awarded would usually be filed subsequent to court approval of

the class settlement." 4 Newberg § 11.24 *et seq*. In accordance with this practice, the matter of attorneys' fees will be addressed in more detail in connection with briefing to be submitted in connection with the final fairness hearing. Nevertheless, Class Counsel respectfully submit that the requested award of attorneys' fees is fair and reasonable under the applicable legal standards routinely applied by courts in the Fifth Circuit when the following factors are taken into account: (1) time and labor required; (2) novelty or difficulty of the issues; (3) skill required to perform the legal services properly; (4) preclusion of other employment; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) amount involved and results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

C. Class Notice

66. If the Court preliminarily approves the settlement, it must direct "notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). It follows that a district court has great discretion in determining the kind of notice to employ in alerting class members to a proposed settlement and settlement hearing, subject to "the broad reasonableness standards imposed by due process." *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir.1979). Notice need only be given in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir.1987) (concluding that

"[w]hile the notice must be adequate, it is not necessary that each member of the class actually receive the notice").

67. Here, the notice program meets and exceeds due process standards. Defendants will provide to the TPA an Excel spreadsheet listing each Class Member's current or last known address according to Defendants' current business records; addresses will be updated; and then the TPA :

(a) will send by first-class mail a Postcard Notice to each identified Class Member; and

(b) make the Long Form Notice available on the settlement website.

(Ex. A, Settlement at 6, ¶ 8).

68. The proposed mailed Postcard Notice and Long Form Class Notice available on the settlement website fully with Rule 23(e)(1). The notices concisely and clearly state in plain, easily understood language: (1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) that Class Member may enter an appearance through counsel if the member so desires; (5) the right to file an objection to the Stipulation of Settlement; (6) the right to exclude themselves from the Settlement; and (7) the binding effect of a class judgment on Class members under Rule 23(c)(3) if the Class member does not opt out. *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 301-302 (W.D. Tex. 2007)(finding that "a simple summary of the proposed settlement is particularly appropriate in a rule 23(b)(2) case such as this"). Class Members will be provided with sufficient information to evaluate the Settlement, and will be directed to Class Counsel on the website for additional information.

D. Final Approval Hearing and Further Scheduling

69. The last step in the settlement approval process is the final fairness hearing, at which members of the Settlement Class who timely submit objections to the settlement may be

heard, and at which the Court makes a final determination about the propriety of the settlement. FED R. CIV. P. 23(e)(1).

70. Pursuant to Rule 23, the Settlement outlines a sequence of events leading up to final approval of the settlement. If this Court grants preliminary approval of the settlement, Defendants will provide the TPA with an electronic database containing relevant information necessary for notice and administration. (Settlement, at 6, ¶ 8). Within 40 days of the preliminary approval order, notice will be given to Class Members by First Class U.S. Mail. (*Id.*).

71. After notice is mailed, Class Members may object to the terms of the Stipulation of Settlement (*Id.* at 7, ¶ 9) or exclude themselves from the Settlement (*Id.* at 7, ¶ 10). The deadline to object or opt-out is 14 days in advance of the Final Fairness Hearing. (*Id.*)

72. Plaintiff requests that, as part of its Preliminary Approval Order, a date be set for the Final Fairness Hearing at the first available date following April 24, 2017.

V. DEFENDANTS DO NOT OPPOSE THE RELIEF REQUESTED IN THIS MOTION

73. Defendants also believe the proposed settlement is fair, reasonable and adequate, and therefore does not oppose the motion and fully supports the relief requested.

VI. CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiff respectfully requests the Court enter an Order (i) granting preliminary approval of the Parties' proposed Class Action Settlement, (ii) certifying the proposed Class for settlement purposes, (iii) directing individual notice to the members of the Class in accordance with Rule 23(c)(2)(B), (iv) appointing Plaintiff as Class Representative, (v) appointing Plaintiff's counsel as Class Counsel, (vi) scheduling a Final Hearing in this matter, and (vii) providing such other and further relief as the Court deems reasonable and just.

Respectfully submitted,

By: */s/ Britton D. Monts*

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ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS

CERTIFICATE OF SERVICE

I certify that on January 13, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court pursuant to the Electronic Filing Procedures and using the CM/ECF system, and that a true and correct electronic copy was then served on Defendants by and through their counsel of record via the CM/ECF system.

/s/ Britton D. Monts
Britton D. Monts